

***United States Court of Appeals
for the Second Circuit***



PETITION

NO. 75-4037

United States Court of Appeals FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

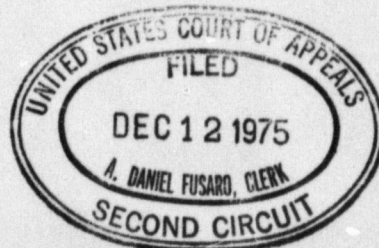
BAUSCH & LOMB, INC.,
Respondent.

On Petition for Review And Cross-Application for Enforcement
of an Order of the National Labor Relations Board

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION

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K. B. & J. Young's Super Markets v. N.L.R.B., 377 F.2d 463 (C.A. 9, 1967), cert. den., 389 U.S. 841	2
N.L.R.B. v. Burns Int'l Security Services, 406 U.S. 272 (1972)	2

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>) Section 8(a)(5)	3
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On Petition for Review And Cross-Applcation for Enforcement
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**PETITION OF
THE NATIONAL LABOR RELATIONS BOARD
FOR MODIFICATION OF OPINION**

On November 25, 1975, the Court (Kaufman, Chief Judge, Friendly and Smith, Circuit Judges) handed down its opinion in the above case denying enforcement of the Board's bargaining order. The Board respectfully petitions the Court to modify its opinion for the reasons set forth below.

In denying enforcement of the Board's bargaining order the Court (sl. op. pp. 679-688) relied not only on organizational changes affecting

the continued appropriateness of the North Goodman Street plant after the acquisition by Bausch & Lomb but also on the finding that successorship "ordinarily requires retention of at least a majority of the 'predecessor's' work force." As the Court noted (sl. op. pp. 682-684) both *N.L.R.B. v. Burns Security Services*, 406 U.S. 272 (1972), and *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), considered the significance of a substantial continuity in the identity of the work force in determining successorship. Both those cases, however, expressly distinguish the situation which the panel majority has found to exist here (sl. op. pp. 675-678) — namely, one in which the predecessor's employees were discriminatorily denied employment and for *that reason* did not make up a majority of the new employer's workforce in the relevant unit. *N.L.R.B. v. Burns, supra*, 406 U.S. at 280-281, n. 5; *Howard Johnson Co., supra*, 417 U.S. at 262, n. 8. Moreover, both these cases cited with approval *K.B. & J. Young's Supermarkets, Inc. v. N.L.R.B.*, 377 F.2d 463 (C.A. 9, 1967), cert. denied, 389 U.S. 841, a case enforcing the Board's bargaining order against a successor employer which had caused the discriminatory mass discharge of unit personnel shortly before the takeover. In so doing the Ninth Circuit expressly rejected the "contention that a discriminatory interruption of employment cannot be challenged since it did in fact occur." *Id.* at 466.

Accordingly, we submit that under the above authority, the issue of successorship is to be considered as if the three boilerroom employees had accepted employment by Bausch & Lomb. The issue remains, however, whether there was a sufficient continuity in the operations at North Goodman street to warrant a finding of successorship. Since the Court has resolved that issue by determining that no such continuity of operations exists — and thus that the continued appropriateness of the unit was affected — a finding of lack of successorship may be sustained even though,

as a matter of law, the employee complement must be deemed to have remained the same.

In sum, the Court's discussion of the continuity of employee complement issue is unnecessary to its decision and may suggest that such factor is relevant where, as here, there has been a discriminatory denial of employment. For these reasons we request that the Court modify the 8(a)(5) portion of the opinion (sl. op. pp. 679-686) either by deleting the discussion of continuity of employment and all references to the fact that none of the General Dynamics employees were offered jobs in the boiler-room after the transfer to Bausch & Lomb,¹ or by making clear that the latter fact is not relevant to the successorship issue here.

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¹ For example, the phrase "and personnel" should be deleted from the sentence at the top of sl. op., p. 685, reading: "Substantially greater continuity of operations and personnel is necessary for successorship to be justified."